1975

Globe Leasing Corporation, Al Weigelt, and Gloria Morrison v. Bank of Salt Lake and Norton Parker: Brief of Appellant

Utah Supreme Court

Carman E. Kipp; Kipp and Christian; Attorneys for Respondents.
Robert M. McRae; Hatch, McRae and Richardson; Attorneys for Appellants.

UTAH SUPREME COURT

BRIEF

SUPREME COURT

OF THE

STATE OF UTAH

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GLOBE LEASING CORPORATION, a Utah Corporation; AL WEIGELT and GLORIA MORRISON, individuals,

Plaintiffs and Appellants,

vs.

Case No. 14155

BANK OF SALT LAKE, a Utah Corporation, and NORTON PARKER, an individual,

Defendants and Respondents.

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APPELLANTS' BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS

-continued-

CASES CITED

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal by plaintiffs from a final judgment dismissing plaintiffs' complaint for failure to comply with an Order compelling deposit of security deposits.

FACTS OF THE CASE AND DISPOSITION IN THE LOWER COURT

Because this appeal is on a pre-trial motion dealing with the provisions of Rule 67 of the Utah Rules of Civil Procedure, the facts on appeal are essentially the facts relating to the disposition of the relevant pre-trial motions in the lower court.

Globe Leasing Corporation, a Utah Corporation, and Bank of Salt Lake, a Utah Corporation, entered into an agreement July 17, 1973, whereby Bank of Salt Lake would selectively finance some or all of Globe Leasing's lease agreements. It was agreed that this arrangement would continue until written notice terminated the arrangement.(File p. 8) For purposes of background only, the court should be aware that Globe Leasing was in the business of leasing automobiles and other vehicles to its customers. (File p. 1) The Bank of Salt Lake would finance the purchase of the automobiles and Globe Leasing would assign a lease agreement between Globe Leasing and its customers to the Bank of Salt Lake as security

for the loan made by the Bank to Globe Leasing. (File p. 1) As part of the collections Globe Leasing would make from its customers, the customers would give Globe Leasing a security deposit to ensure proper care of the leased vehicle and payment of the rentals. (File pp. 145,146). On July 17, 1974, Globe Leasing was abruptly notified that the agreement between the Bank of Salt Lake and Globe Leasing was terminated. (File p. 8) The Bank on July 15, 1974 had written letters to Globe Leasing's customers informing them that they no longer were to pay Globe Leasing but were now to pay the Bank. On July 23, 1974, Globe Leasing filed its complaint alleging various counts of business interference and business slander. (File p. 1)

A temporary restraining order was issued on July 30, 1974, restraining the Bank of Salt Lake from collecting or holding any lease payments. (File p. 19) On the same day, defendants filed a motion to dismiss and compel payment of funds. (File p. 27) On August 1, 1974, defendants' motions were denied because they were not properly presented and defendant Bank of Salt Lake was ordered to collect rental payments and make a strict accounting. (File p. 35) On that day, defendants filed their answer to the complaint. (File p. 36) On August 5, 1974, Mr. Weigelt's deposition was taken (File p. 109) On August 20, 1974, defendants filed a motion to compel depositing of security deposits.(File p. 86) On September 4,

1974, Norton Parker (a defendant in this case) has his deposition taken. On September 12, 1974, defendants' motion to compel deposit of funds is granted. (File p. 224) March 7, 1975, defendants filed a motion to dismiss plaintiffs' complaint on grounds that the order of September 12, 1974 is not complied with. (File p. 293) On April 9, 1975, plaintiffs are given ten days to deposit security deposits. (File p. 300) On April 16, 1975, plaintiffs filed a motion to vacate the order to deposit. (File p. 304) Between April 16 and April 23, 1975, the then counsel for plaintiffs withdrew from the case. On April 28, 1975, present counsel entered his appearance for plaintiffs.(File p. 309) During the interim of changing counsel, on April 23, 1975, an order dismissing the complaint was issued. (File p. 307) Plaintiffs' April 16, 1975 motion is denied on May 15, 1975 for non-appearance at the April 23, 1975 hearing on dismissal. (File p. 313) Plaintiffs then filed a motion attacking jurisdiction which was denied May 16, 1975, because it was filed after the order dismissing the complaint. (File p. 314) On the filing of a verified motion by plaintiffs' counsel explaining his reasons for non-appearance, the court sets the motion to vacate order to deposit for hearing on May 21, 1975. (File p. 319) On May 21, 1975, plaintiffs' motion is denied, (File p. 320) the April 23, 1975 order is vacated and re-entered as a final judgment

against plaintiffs. (File p. 323) Plaintiffs file a motion attacking the original September 12, 1974 order to deposit security deposits as void for lack of jurisdiction and attack the order of dismissal on the same grounds. (File p. 325) Plaintiffs' motion is denied, (File p. 338), after it finally got back to Judge Hall for hearing.

RELIEF SOUGHT ON APPEAL

The order of May 21, 1975, dismissing plaintiffs' complaint should be vacated for lack of jurisdiction, as the order of September 12, 1974, compelling deposit of security deposits was entered without jurisdiction. The case should be remanded to the District Court for trial setting to determine the issues of law and fact in this case.

POINT I

THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ISSUE AN ORDER REQUIRING PLAINTIFFS TO DEPOSIT SECURITY DEPOSITS IN THE SUM OF $11,323.47 BECAUSE THE ORDER WAS ISSUED IN VIOLATION OF RULE 67 OF THE UTAH RULES OF CIVIL PROCEDURE.

Appellants contend that the court had no authority to issue its order because the requisite fact situation required by Rule 67 did not exist.

At the outset, Rule 67 of the Utah Rules of Civil Procedure must be carefully examined with respect to the facts

in this case. The Rule, insofar as it is pertinent to this case, reads as follows:

> "When it is admitted by the pleadings, or shown upon the examination of a party, that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court or delivered to such party upon such conditions as may be just, subject to the further direction of the court . . ."

It is clear from the very face of the rule that five (5) requirements must be met by the fact situation in this case before the court can order funds to be deposited. Those requirements are:

1. The party being ordered to deposit funds must admit non-ownership by his pleadings or upon examination.

2. The party being ordered to deposit must admit that he has the funds in his possession or under his control.

3. The funds must be capable of delivery.

4. The funds must be "the subject of litigation."

5. The party being ordered to deposit must admit that the funds are held in trust by him for another party or that the funds belong or are due to another party.

Appellants strenuously contend on appeal, as they did to the lower court by memoranda and by oral argument, that these prerequisites to the issuance of an order to deposit were not met by the facts of this case. In order to make this

point completely clear to the court, Appellants will examine each of the rules requirements with respect to the facts in this case and with respect to case authority interpreting the rule. For purposes of continuity requirements, 1 and 5 of the rule will be discussed together.

A

AT NO TIME HAVE APPELLANTS ADMITTED THAT THE FUNDS IN QUESTION BELONG OR ARE DUE TO THE BANK OF SALT LAKE OR TO THE LESSEES AND HAVE AFFIRMATIVELY CONTENDED THAT THE FUNDS ARE APPELLANTS' PROPERTY AND THAT APPELLANTS HAVE THE RIGHT TO USE THOSE FUNDS AS THEY WISH UNTIL THE TERMS OF THE LEASE ARE COMPLIED WITH.

It is curious indeed that at oral argument Appellee, in the face of the rule's requirement, states, "That fact is evidenced by Mr. Weigelt, president of Globe, by his deposition, by Mr. Parker, the president of the banks affidavit, by his deposition and by the documents which are before the Court . . . " (File p. 345) It is crystal clear from the Rule that any comments or writings, except those by Mr. Weigelt, are irrelevant for purposes of admittance of ownership under the rule. It is Mr. Weigelt who must admit that the funds do not belong to Globe Leasing and at no time has he done so. But since Appellee contends that Mr. Weigelt has admitted its lack of ownership, it will be useful to the court to examine Mr. Weigelt's statement as recorded in the file before the Court.

During the taking of Mr. Weigelt's deposition, the subject of the deposits for security was discussed very briefly three times, twice by direct reference and once indirectly.

The subject first appears at page 5 of his deposition. (File p. 113) Counsel for defendant has been asking questions about Mr. Weigelt's first marriage with respect to alimony, child support and other debts. Mr. Weigelt's then counsel challenges the line of questioning. Mr. Kipp, counsel for defendant, responds:

> "Yes, I would like to find out something about the financial situation of the Corporation with respect to the security of certain funds we have in dispute; and I would think any obligations which they have relating to payments of alimony, child support, mortgages, other debts, would be relevant. That's what I intend to ask about."

The reference to security deposits is vague and indefinite, but if this reference by Mr. Kipp is taken to be an admittance of ownership or trusteeship by Mr. Weigelt, Appellants fail to understand what the word admittance means. Mr. Weigelt has not uttered a word.

The subject of security deposits is raised directly at pages 37 and 38 of the deposition. (File, pp 145, 146).

Q. Didn't you also collect a security deposit from the lessee?

A. Yes.

Q. How much was that?

A. I believe in the case of Richter-Robb it's probably $150.00.

Q. And it varied thereafter between what sums?

A. A high of $250.00, to a low of $100.00.

Q. What happened to that money?

A. That money's utilized by the corporation as operating capital.

Q. And it's your position that that money was not to be paid to the bank?

A. It was not, and it is not supposed to be.

Whatever admittance is made in these statements, it is clear, is it not, that Mr. Weigelt directly denies that the Bank of Salt Lake has any right to the security deposits. Nor does Mr. Weigelt admit to any ownership by the lessees. On the contrary, Mr. Weigelt's admittance that the money was spent in the course of business lends itself to only one interpretation, to-wit: that the money belonged to the Corporation for the duration of the leases and they were perfectly within their right to use the security deposits as operating capital because they had a proprietary right, a vested proprietary right to the use of the money. In short, these comments as quoted offer no compliance with the admittance aspects of Rule 67 on which to base an order to deposit funds.

The subject appears in the deposition one last time at page 59. (File p. 167)

Q. And you've told me that you collected so-called security deposits ranging from $100.00 to $250.00, and that those sums have been retained by Globe Leasing?

A. Correct.

Read in the context of the rest of the deposition, these statements admit only what has already been discussed, namely that the money was collected and spent as operating capital. From Mr. Weigelt's deposition, there is absolutely no compliance with the requirements of Rule 67.

The subject of security deposits appears twice more in the file before the Court. At page 101 of the file, in Plaintiffs' Reply to Counterclaim, under Plaintiffs' second defense, Plaintiff states:

> 1. Plaintiff GLOBE LEASING CORPORATION admits that it has received a certain sum of money as security but denies that in or in all [sic] said security deposits are the property of [sic] should be paid over to the defendant BANK OF SALT LAKE.

This reply was submitted on September 6, 1974, just seven days before the original order to deposit was granted. No compliance with the admittance aspects of Rule 67 appears and read in context with Mr. Weigelt's deposition is clearly consistent with comments in that deposition.

At page 222 of the file before the Court in an affidavit filed two days before the original order, Plaintiffs denied that the Defendant Bank of Salt Lake had any "claim to or interest in any lease deposits collected by Globe Leasing Corporation. As [sic] agreed at the time of the original agreement. . ."

Clearly, Appellants have never admitted that any other party had any claim or title to the security deposit funds. Quite the contrary is true. Appellants have admitted by their statements and by implication that Appellants are the only parties that have a right to the use of the funds and that their only covenant was to have a sufficient amount of money at the end of any particular lease to return the deposit that had been given if the terms of the lease were complied with.

That admittance of ownership or trusteeship in favor of another party is a crucial requirement of the Rule and is the subject of many cases interpreting Rule 67.

In In re Elias, 25 Cal. Rptr. 739, 209 C. App. 2d 262 (1962), the issue on appeal was the same as in the instant case. It was alleged that the lower court was without jurisdiction to issue the order to deposit. In interpreting a rule, the exact duplicate of the Utah Rule, and after an extensive review of the authorities, the court said:

> "As we have seen, there is no admission by Harry Elias in any pleading filed up to date that any sum is owed by him to the plaintiff or to any other person; both he and the surety company deny any indebtedness on his part; and it has not been proven that any such sum is in fact due because the trial has not yet been held." (25 Cal. Rptr. at 745) (Emphasis added.)

The Court in In re Elias, supra, quotes favorably from Ex Parte Casey, 71 Cal. 269, 12 P. 118 at 119:

> "Section 572, of the Code of Civil Procedure, [the exact duplicate of Utah's Rule 67] refers to property which is, without question, in the hands of a trustee as trust property, or which belongs to or is due to another. It does not refer to that where the party alleged to hold as trustee claims title to it in his own right." (Emphasis added.)

The Elias, supra, court also cites with agreement Burke v. Superior Court, 7 Cal. App. 178, 93 P. 1058 (1907):

> "His answer showed that petitioner claimed the right to part of the fund in his possession, and the court was without jurisdiction to compel him to surrender to another what he claimed to be his property, until there had been a judicial determination, upon the hearing of all the facts, that he had no right to it. To justify the making of the order, the admission in the pleadings of having money in possession belonging to another must be free from any claim thereto." (93 P. at 1060) (Emphasis added.)

To the same effect are Sanborn v. Blankenheim, 346 Ill. App. 214, 104 N.E. 2d 573 (1952), Brooks v. Galicia Steamship Company, Fla., 237 So. 2nd 583 (1970), HMR Development Corp. v. District Court, 152 Colo. 266, 381 P. 2d 259 (1963), Bata v. Hill, 35 D. Ch. 184, 113 A. 2d 740 (1955), City of Philadelphia v. Schofield, 375 Pa. 554, 101 A. 2d 625 (1954).

It is clear that Appellants have never once admitted and have consistently denied that Appellants owed any money to Bank of Salt Lake or that the money was held in a trust fund for Lessees. To repeat, Appellants have consistently affirmed

their proprietary interest in the money and their right to the use of the money. (File p. 223) In short, they assert ownership of the money which counsel for defendant disputed at oral argument. Even assuming, arguendo, that Appellants may be in error as to their belief about the ownership and rights to the funds, the cases are clear, that that is a decision that must be made after a hearing on all the facts. The meaning of the word deposit, the effect of that meaning under Article 9 of the Uniform Commercial Code, whether or not the leases are actual sales or security agreements, the effect of those determinations as to the rights of ownership and use of the funds, and other obvious questions must be decided at trial, not in a summary proceeding.

Appellants, therefore, submit that the lower court was without jurisdiction to issue the order to deposit based on the facts and case law pertinent to the instant case. Appellants further submit that to force them to deposit funds when the court is without jurisdiction is a denial of procedural due process and the subsequent order of dismissal was made in error.

B

AT NO TIME HAVE APPELLANTS ADMITTED THAT THE FUNDS IN QUESTION ARE UNDER THEIR PRESENT CONTROL OR POSSESSION AND THEREFORE THE MONEY IS NOT CAPABLE OF DELIVERY AND THE LOWER COURT WAS WITHOUT JURISDICTION TO ORDER A DEPOSIT OF THE FUNDS UNDER THESE CIRCUMSTANCES.

Requirements 2 and 3 of Rule 67 will be treated together for sake of brevity and to avoid repetition.

The fact that the money is gone has been raised in several cases.

In Burke v. Superior Court, supra, the court said at 93 P. 1059:

> "The court's jurisdiction to make the order requiring petitioner to deposit in court the sum of $2,050 was, under the provisions of said Section [the exact duplicate of Utah's Rule] dependent upon whether or not petitioner by his pleading admitted having in his possession said sum of money belonging to the corporation. If he did not make such admission, then it would seem clear that the court was without jurisdiction to make such order." (Emphasis added.)

Other cases have held the same. Brooks v. Galicia Steamship Co., supra, Sanborn v. Blankenheim, supra, In re Elias, supra, Firemen's Mut. Benev. Ass'n of City of New York v. Clifford, 201 App. Div. 315, 194 N.Y.S. 295 (1922), and Intra-Mar Shipping (Cuba) S.A. v. John S. Emery & Co., 11 FRD 284 (S.D.N.Y., 1951). In Intra Mar, supra, there was absolute proof that the funds in question were spent. The court had this to say with respect to that requirement of the Rule calling for capability of delivery:

> "It is unnecessary to now determine whether defendant became a trustee of the moneys it collected. It is clear from plaintiff's affidavits and briefs that the fund in question has been spent by defendant and that there is no longer any property capable of delivery. It was the discovery of this fact on examination of defendant's officers that prompted plaintiff to

> renew with added vigor this motion, which had been previously made and denied. Aside from this, we have no unequivocal admission on defendant's part that the funds are held by it." (11 FRD at 285) (Emphasis added.)

It is clear from the cases cited and the facts in this case that the money is no longer in plaintiffs' possession and therefore the lower court was without jurisdiction to issue an order to deposit. The clear purpose of the rule is to preserve a fund actually in existence and actually controlled by the party ordered to be deposited. See all cases previously cited and also Lakewood Trust Co., et al., v. Lawshance Co., 100 N.J.E. 572, 136 A. 181 (1927), Graysonia, N. & A.R. Co. v. Newberger Cotton Co., 170 Ark. 1039, 282 S. W. 975 (1926), Robinson v. City of Pine Bluff, 224 Ark. 791, 271 S.W. 2d 419 (1955). In every case cited, the rule interpreted is the same rule that is under discussion in this case. When the fund is gone, for whatever reason, the order cannot issue. Furthermore, questions and issues presented at the beginning of this section must be decided at trial. It is also of significance that at oral argument plaintiffs also argued that the deposits were worked into the leases so that at the end of a lease the deposit could be returned. (File pp. 348, 355) It is also of significance that if this claim is true, which must be proved at trial, it is the Bank who is now collecting all the rentals (File p. 35, 57) and, therefore, both the Bank and the Lessees are secure in their interests to the deposits.

The District Court, therefore, was without authority to issue the order to deposit because it lacked the jurisdiction to do so.

C

THE LOWER COURT WAS WITHOUT JURISDICTION TO ISSUE THE ORDER TO DEPOSIT SECURITY DEPOSITS BECAUSE IN ACCEPTING DEFENDANTS' THEORY OF THE CASE AT ORAL ARGUMENT IT ISSUED THE ORDER IN THE FACE OF DEFENDANTS' POSITION THAT THE FUNDS WERE NOT THE SUBJECT OF THE LITIGATION AND EVEN IF THE COURT DID NOT ACCEPT DEFENDANTS' THEORY AND THE FUNDS ARE THE SUBJECT OF THE LITIGATION, THE ORDER CANNOT ISSUE BECAUSE TITLE TO THE FUNDS WAS IN DISPUTE.

Defendants' argument at page 347 of the file before the court, contending at lines 4-10 in connection with the rest of defendants' statements that this case is distinguishable from the authorities cited because the money is not in dispute between the litigants, i. e. the fund is not "the subject litigation!" The court seems to accept the argument and in the face of the rule requiring that the fund being deposited be the subject of the litigation allows the order to stand! Even more impossible to understand, under the facts in this case, is that at the same time Defense counsel argues his impossible situation he also implies that if the cases were applicable, the order cannot stand.

Defense counsel has made a very unique attempt to escape the impact of the rule. It is apparent, first of all, from the pleadings, affidavits and motions in this case, that at the outset Defendants were claiming the security deposits as "their" property," that the funds were "due them" and that apparently plaintiffs had assigned all their rights to any funds plaintiffs might have collected and that the monies were in dispute. (File, pp. 28, 37, 39, 211, 212, 215) It is apparent from defendants' motions that they were claiming title to the funds and in desperation attempted to distinguish the cases on a position conflicting with that stated in affidavits and motions. But in choosing to use this conflicting position, defendants cannot overcome Rule 67. If the money is not in dispute between the litigants, the rule does not apply. If the money is in dispute as the affidavits, motions and pleadings show, then conflicting titles to ownership and rights of use cannot be decided under Rule 67 but must be left to trial to be resolved by normal judicial proceedings. Clearly, the lower court was without jurisdiction to issue the order to deposit.

D

SINCE THE COURT WAS WITHOUT JURISDICTION TO ISSUE THE ORDER TO DEPOSIT SECURITY DEPOSITS IT WAS ALSO WITHOUT JURISDICTION TO DISMISS THE PLAINTIFFS' CAUSE OF ACTION BASED ON AN UNAUTHORIZED ORDER.

Burke v. Superior Court, supra, and In re Elias, supra, both indicate that if the order to deposit is void, any other order based on the original void order is also invalid.

CONCLUSION

Based on the pleadings, motions, affidavits and depositions of Mr. Weigelt in this case, the order to deposit security deposits was void and a nullity because Mr. Weigelt did not admit adverse ownership of the funds, possession of the funds, control of the funds, that he held them in trust for anyone, or any other fact which could have given the court jurisdiction to issue the order. To the contrary, Mr. Weigelt alleged that the funds were rightfully Globe Leasing's, that he could use them in his business, that they were in fact used in the business and are no longer capable of delivery for they no longer exist.

Therefore, Plaintiffs-Appellants respectfully submit to this court that the order to dismiss plaintiffs' complaint and to deposit funds be vacated and that the case be remanded to the lower court to be set for trial and a determination of the issues of law and fact presented by this case.

Respectfully submitted,

HATCH, McRAE & RICHARDSON

By _____

Robert M. McRae
Attorney for Plaintiffs-Appellants

CERTIFICATE OF MAILING

This is to certify that I mailed two (2) copies of the foregoing brief to Carman E. Kipp of the firm of Kipp and Christian, Attorneys for Defendants-Respondents, 520 Boston Building, Salt Lake City, Utah 84111, this 17th day of October, 1975.

Robert M. McRae